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LAWYER-CLIENT CONFIDENTIALITY: RETHINKING THE TRILEMMA

*Monroe H. Freedman**

Lawyers are not undercover informants.
– Stephen Gillers¹

I. INTRODUCTION

The trilemma refers to three ethical obligations bearing on lawyer-client confidentiality, all of which a lawyer cannot simultaneously obey when faced with client perjury. A lawyer is required (1) to learn as much as possible about a client's case;² (2) to inform the client of the lawyer's obligation to keep information confidential;³ and (3) to reveal confidential information to the court if the lawyer knows that the client has committed perjury.⁴

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1. Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008, at WK4 (quoting Professor Stephen Gillers).

2. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1); *see also* ABA STANDARDS FOR CRIM. JUSTICE § 4-4.1 cmt. (2d ed. 1986); MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (1983) [hereinafter MODEL RULES] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, introductory note (1998) [hereinafter RESTATEMENT (THIRD)].

The renowned trial lawyer, Edward Bennett Williams, said: "Any lawyer surprised by facts at a trial has failed in the preparation. It's that simple." Accordingly, "I demand complete candor and honesty from the client—no holding back." Priscilla Anne Schwab, *Interview with Edward Bennett Williams*, in THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 1178, 1180, 1182 (John G. Koeltl, ed., 2nd ed. 1989). In the same Primer publishing the statements by Williams, Irving Younger wrote: "[N]othing [should] come as a surprise . . . Everything must be anticipated . . . If a lawyer doesn't already know what the case is all about, he shouldn't be trying it." Irving Younger, *Cicero on Cross-Examination*, in THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS, *supra* at 532-33, 535.

3. MODEL RULES R. 1.6(a).

4. MODEL RULES R. 3.3(a)(3).

My view is that the lawyer cannot give effective assistance of counsel without knowing as much as possible about a client's case, that clients will frequently withhold critical information from the lawyer unless the lawyer promises confidentiality, and that the lawyer should not then violate her promise of confidentiality if the client testifies perjurally.⁵ Accordingly, the obligation that must be sacrificed is candor to the court regarding what the lawyer has learned from the client in confidence.⁶ In my experience, this is the position of an overwhelming number of criminal defense lawyers, and, as shown in the next Part, it is the traditional position of the American Bar Association ("ABA").⁷

Nevertheless, a prominent figure in lawyers' ethics, Professor Stephen Gillers, took a contrary position in a 2006 article titled *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*.⁸ However, Gillers subsequently changed his mind in *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*.⁹

II. A BRIEF HISTORY OF THE TRILEMMA

The trilemma has existed in the ABA's codifications of ethical rules for lawyers since the 1908 Canons of Professional Ethics, and it has continued through the 1969 Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct ("Model Rule(s)" or "Rule(s)").¹⁰ Under each of these codifications, the ABA has resolved the trilemma in favor of lawyer-client confidentiality over candor to the court.¹¹

5. Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS, Winter 2008, at 133, 138.

6. *Id.* at 137.

7. See *infra* Part II.

8. See generally Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821 (2006) [hereinafter Gillers, *Freedman's Solution*].

9. See Stephen Gillers, *Guns, Fruits, Drugs and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 STAN. L. REV. 813, 822-24 (2011) [hereinafter Gillers, *Real Evidence*]. In reversing his position, Professor Stephen Gillers has joined Judge Marvin Frankel and Professor Geoffrey Hazard, Jr., also former critics of my view of lawyer-client confidentiality. Some of the disagreements have focused particularly on the perjury trilemma, but the disagreements have related more broadly to the importance of lawyer-client confidentiality. See MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 185-86 (4th ed., 2010) [hereinafter UNDERSTANDING LAWYERS' ETHICS].

10. See Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1107-08, 1144-50, 1147 n.286 (1985).

11. *Id.* at 1146 n.280, 1147-49; see UNDERSTANDING LAWYERS' ETHICS, *supra* note 9, at 185-86; Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected*

For example, in Formal Opinion 268 (1945), the ABA Standing Committee on Ethics and Professional Responsibility stated: “While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court [Canon 29], this duty does not transcend that to preserve the client’s confidences [Canon 37].”¹²

Then, in Formal Opinion 287 (1953), the Committee held that precisely because the lawyer is an officer of the court, she is bound by the court’s own rules for the administration of justice to maintain her client’s confidences, even in the face of a client’s perjury. The ABA Committee said:

“We yield to none in our insistence on the lawyer’s loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.”¹³

Similarly, under the Model Code, Formal Opinion 341 considered an apparent requirement in the Code that a lawyer disclose client fraud on the court or on third parties.¹⁴ The Committee found such an obligation to be “unthinkable,” and dismissed the apparent requirement of disclosure of client confidences as an oversight in drafting.¹⁵ On the basis of “tradition . . . backed by substantial policy considerations,” the Committee reaffirmed that confidentiality takes precedence over candor to the court.¹⁶

The Model Rules appeared to make a major change in that traditional position, but to minimal effect. As held in Formal Opinion 87-353: “It must be emphasized that this opinion does not . . . require the lawyer now to judge, rather than represent, the client.”¹⁷ In fact, only in “the unusual case” will the lawyer be required to reveal a client’s perjury.¹⁸

Privilege, 41 DUKE L.J. 572, 595 (1991).

12. ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 268 (1945); Subin, *supra* note 10 at 1147 n. 286.

13. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 287 (1953).

14. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 341 (1975).

15. *Id.*

16. *Id.*

17. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 87-383 (1987).

18. *Id.*

The reason is that the lawyer's obligation to disclose client perjury to the tribunal is "strictly limited" by Model Rule 3.3 to the situation where the lawyer "knows" that the client has committed perjury.¹⁹ And "know" and "knowledge" are defined in the Model Rules as requiring "actual knowledge."²⁰ The situations where the lawyer knows will ordinarily be based on "admissions the client has made to the lawyer."²¹ Moreover, as shown below, the Fifth and Sixth Amendments are violated if a lawyer elicits incriminating admissions from a client, and then reveals those admissions to a court and/or the prosecution.²²

In *Nix v. Whiteside*,²³ the court-appointed defense counsel inferred that his client intended to commit perjury and threatened to tell the trial judge.²⁴ As a result, the defendant omitted the particular testimony and the lawyer did not reveal any client confidences.²⁵ Subsequently, the client appealed his conviction, and the Supreme Court held that the defense lawyer had not violated the Sixth Amendment when he threatened to reveal his client's perjury.²⁶

The decision in *Nix v. Whiteside* is sometimes misunderstood as having settled all constitutional questions regarding a lawyer's obligations relating to client perjury. In fact, *Nix* was limited to a single important constitutional issue.²⁷ *Whiteside*'s unappealing contention was that in dissuading the perjury, his lawyer had violated *Whiteside*'s right to effective assistance of counsel and prejudiced his case.²⁸ The Court, therefore, held only that when defense counsel dissuaded the part of *Whiteside*'s testimony that was perjurious by saying he would reveal it to the court, the lawyer's conduct "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment."²⁹

19. *Id.*

20. MODEL RULES R. 1.0(f); RESTATEMENT (THIRD) § 120, cmt. C (1998).

21. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-383 (1987). Both the Model Rules and the American Law Institute's Restatement Third of the Law Governing Lawyers say that a lawyer's knowledge "may be inferred from circumstances." MODEL RULES R. 1.0(f); RESTATEMENT (THIRD) § 120, cmt. C. However, the Restatement explains that such an inference can be drawn only if the lawyer ignores what is "plainly apparent." RESTATEMENT (THIRD) § 120. And what is "plainly apparent" does not include information that the lawyer could discover by making a reasonable inquiry. *Id.* As a result, it is indeed "the unusual case" in which a lawyer would feel compelled to reveal client perjury under Rule 3.3 of the Model Rules of Professional Conduct.

22. *See infra* Part IV.A.

23. 475 U.S. 157 (1986).

24. *Nix v. Whiteside*, 475 U.S. 157, 161 (1986).

25. *Id.* at 162.

26. *Id.* at 175-76.

27. *Id.* at 166.

28. *Id.* at 162, 173-74.

29. *Id.* at 166.

The Court noted, however: “Robinson divulged no client communications until he was compelled to do so in response to Whiteside’s post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.”³⁰

Professors Geoffrey Hazard, Jr., and William Hodes have emphasized that Robinson “merely threatened” to reveal Whiteside’s perjury, but “did *not* blow the whistle.”³¹ This critical factual limitation of the *Nix* decision left the client perjury issue “murkier” than even Chief Justice Burger’s misstatements of law and fact in the majority opinion.³²

Moreover, within weeks of the decision in *Nix*, the ABA and the American Law Institute produced a videotape in which several experts criticized the idea that a criminal defense lawyer might be ethically required to divulge his client’s perjury.³³ That notion was characterized as “startling, unworkable, and out-of-touch with the dynamics of the lawyer-client relationship.”³⁴

III. GILLERS’S CHANGE OF POSITION ON POLICY

A. Gillers’s Two Articles on Lawyer-Client Confidentiality

Professor Gillers’s initial disagreement with my analysis was expressed in his *Hofstra Law Review* article, *Monroe Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma Is Wrong as a Matter of Policy and Constitutional Law*.³⁵ However, Gillers has since

30. *Id.* at 172.

31. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 29.19 (3d ed. 2014).

32. *Id.* The Chief Justice’s conclusions, analysis, and use of authorities have been severely criticized. Professor Norman Lefstein has observed that the majority opinion “contains a shocking misstatement of the law pertaining to client perjury.” Norman Lefstein, *Reflections on the Client Perjury Dilemma and Nix v. Whiteside*, *CRIM. JUST.*, Summer 1986 at 27, 28. Another critic of the Chief Justice’s inaccuracies is Brent Appel, the Iowa Deputy Attorney General who argued and won *Nix v. Whiteside*. See Brent Appel, *Nix v. Whiteside: The Role of Apples, Oranges, and the Great Houdini in Constitutional Adjudication*, 23 *CRIM. L. BULL.* 5, 20-21 (1987); see also Monroe H. Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora’s Box*, 23 *CRIM. L. BULL.* 25, 26-27 (1987).

33. In addition, Brent Appel was quoted in the *ABA Journal* as saying that if the lawyer does not “know for sure” that a witness’s testimony is false, the lawyer should present the evidence to the court. David O. Stewart, *Drawing the Line at Lying*, 72 *A.B.A. J.* 84, 88 (1986). As long as the client “never admits that [the story] is false,” St. Louis attorney Robert Haar added, most lawyers “suspend judgment and do the best they can.” Any different standard of “knowing,” he explained, would be “at war with the duty to represent the client zealously.” Stewart, *supra*.

34. See Freedman, *supra* note 5 at 144 (internal quotation marks omitted).

35. See generally Gillers, *Freedman’s Solution*, *supra* note 8. Gillers was responding to my

reversed the views he expressed in that article, and he has adopted the same position on lawyer-client confidentiality as mine in a more recent article.³⁶ That is, on both policy and constitutional grounds, Gillers has concluded that protecting the client's interests takes precedence over disclosing client information.³⁷

B. *The Lawyer's Withholding Real Evidence Is the Harder Case*

Gillers's subject in the more recent *Stanford Law Review* article is the lawyer's possession of real evidence, such as the client's murder weapon or an incriminating stolen item.³⁸ He writes: "[T]he cases—possibly excepting white-collar cases—require the lawyer to deliver the item to authorities even without subpoena and even if the item is powerfully incriminating This is wrong both as a matter of policy and as a matter of law."³⁹

True. But, arguably this situation is an even less compelling one for the preservation of client confidentiality than the client perjury situation. When a lawyer withholds a tangible item, the tribunal is not merely being misled by false testimony; it is unaware of the very existence of the evidence. In addition, in the case of client perjury, the person who does the misleading is the client.⁴⁰ But, when the lawyer withholds a murder weapon or other incriminating item, the lawyer is the person who "conceal[s] a document or other material having a potential evidentiary value."⁴¹ Moreover, the client who testifies falsely is subject to cross-examination and rebuttal, whereas the court never hears a challenge to the lawyer's suppression of the weapon or stolen item.⁴² The case of real evidence, therefore, is arguably the more difficult one in which to maintain that lawyer-client confidentiality takes precedence over candor to the court.

position as expressed in the third edition of *Understanding Lawyers' Ethics*, published in 2004. With some updating, that is substantially the same as my position in the fourth edition, published in 2010, so my references here will be to the fourth edition. See generally UNDERSTANDING LAWYERS' ETHICS, *supra* note 9.

36. See Gillers, *Real Evidence*, *supra* note 9, at 850-51.

37. *Id.*

38. *Id.* at 822-23.

39. *Id.* at 860.

40. MODEL RULES R. 3.3(a)-(b).

41. MODEL RULES R. 3.4(a). A lawyer who conceals real evidence might also be prosecuted for obstruction of justice. Gillers contends that "concealment" is a "legal conclusion" and does not "fit[] well." Gillers, *Real Evidence*, *supra* note 9 at 830. Even if characterized as concealment, he argues, the lawyer's retention of the weapon is "not 'with the intent to impair the object's . . . availability for use in an official proceeding.'" *Id.* Rather, the intent may only be "to avoid making the legitimate use of counsel costly to the client." *Id.*

42. MODEL RULES R. 3.3(a).

C. *Discriminatory Use of Model Rule 3.3 Against Indigent Defendants*

There is a preliminary but critical policy issue that Gillers does not deal with in either of his articles. Gillers's first article is based on a talk he gave at a Hofstra Law School ethics conference.⁴³ Prior to the conference, I asked him to address the fact that virtually all of the cases in which lawyers reveal client perjury involve court-appointed lawyers representing indigents, who are disproportionately non-white, thereby producing a de facto violation of equal protection.⁴⁴

The issue is important because poor people should receive no less effective representation than those who can pay for a lawyer.⁴⁵ It is discriminatory, and it is a denial of equal access to justice for indigent clients to receive a lower level of confidentiality, causing them to further mistrust court-appointed lawyers, communicate less, and thereby receive less effective representation.

When Gillers failed to mention this issue in his talk at the conference, I raised it with him in the question period. Here is his answer from the conference transcript:

"So now we got a little too complicated, because we forced the lawyers to look at the rules. All right. Well, then there are—that would be part of the record and, you know, it depends—upon the conversation."⁴⁶

Nor did Gillers choose to replace that incoherent response when he was given the opportunity to edit the transcript, or to address the issue in the text of his subsequently published article.⁴⁷

In an online Legal Ethics Forum, Gillers claimed that he had answered the policy question in response to a question at the conference from Professor Ellen Yaroshefsky.⁴⁸ However, his answer to Yaroshefsky was speculative and, at best, only partly responsive to the issue of de facto discrimination against clients of court-appointed lawyers. Gillers said, "One never knows, but in the event of a more flexible policy, the opportunity, the license, if you will, to do what cannot now be done by way of anticipatory perjury, might result in more than now exists; i.e., empirically perhaps the criminal defense lawyer

43. Gillers, *Freedman's Solution*, *supra* note 8, at 821 n.1.

44. See UNDERSTANDING LAWYERS' ETHICS, *supra* note 9, at 184; Freedman, *supra* note 5, at 148-49.

45. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

46. Gillers, *Freedman's Solution*, *supra* note 8, at 843.

47. Monroe Freedman, *The Criminal Defense Lawyer's Trilemma*, LEGAL ETHICS F. (Oct. 11, 2009, 12:43 AM), <http://www.legaethicsforum.com/blog/2009/10/the-criminal-defense-lawyers-trilemma.html>.

48. *Id.*

today urges the client not to get on the stand and lie, cognizant of Rule 3.3. If Rule 3.3 were not there, and lawyers were not at risk, they might see that as another legitimate tactic in the defense of a criminal accusation. They might not be as scrupulous or careful as you suggested they are in the Rule 3.3 regime.”⁴⁹

Gillers’s unsupported suggestion is that, because of Rule 3.3, clients might be persuaded by their lawyers to refrain from perjury. But, that doesn’t explain why only lawyers representing indigent clients are revealing client perjury, unless the unexpressed and questionable assumption is that only fee-paying clients can be dissuaded from perjury. In fact, unlike indigent clients, fee-paying clients are able to discharge any lawyers who threaten to reveal their perjury, and can hire more accommodating counsel.⁵⁰

D. *Imposing a Cost on Informed Legal Advice*

My major concern is that requiring lawyers to reveal confidential information to state authorities will cause clients to withhold critical information from their lawyers.⁵¹ Such a disclosure requirement imposes a cost on the client’s right to fully informed legal advice. As the Supreme Court held in *Fisher v. United States*:⁵² “As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”⁵³

Gillers originally dismissed this concern, saying that he did not believe that requiring lawyers to reveal confidences would dissuade clients from being candid with their lawyers.⁵⁴ In the *Stanford Law Review* article, however, Gillers refers to the importance of providing the client with “fully informed legal advice”⁵⁵ and quotes *Fisher* with approval.⁵⁶ For this reason, he says, a state should not be able to force a lawyer to produce a weapon “at risk of discipline and prosecution.”⁵⁷ If the lawyer needs to examine or test the murder weapon in order to

49. Gillers, *Freedman’s Solution*, *supra* note 8, at 845.

50. *Id.*

51. UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 121, 155-56, 161.

52. 425 U.S. 391 (1976).

53. UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 136 (quoting *Fisher v. United States*, 425 U.S. 391, 403); *see also* UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 128-29, 152-53, 154-57.

54. Gillers, *Freedman’s Solution*, *supra* note 8, at 826.

55. *See* Gillers, *Real Evidence*, *supra* note 9, at 829.

56. *Id.*

57. *Id.*

represent the client, that threat may discourage the lawyer from accepting the weapon, thereby undermining the client's interest in the advice of counsel.⁵⁸ Moreover, "even when no such examination is needed, the threat discourages the lawyer from taking possession of a dangerous or stolen item."⁵⁹

IV. GILLERS'S CHANGE OF POSITION ON CONSTITUTIONAL PROTECTION OF CONFIDENTIALITY

A. *A Summary of My Position*

My position regarding the constitutional protection of lawyer-client confidentiality is based on the relationship between the Fifth and Sixth Amendments. Providing advice to a client about his Fifth Amendment rights is an essential part of a defense lawyer's job in providing effective assistance of counsel under the Sixth Amendment.⁶⁰ The reason is that "[a] layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege," and the assertion of that right, therefore, "often depends upon legal advice from someone who is trained and skilled in the subject matter."⁶¹ Thus, the Fifth Amendment, coupled with the Sixth Amendment, protects the accused from being made "the deluded instrument of his own conviction."⁶²

The constitutional issue arises in the case of client perjury because the lawyer is ethically required to impress upon the client "the imperative need [that the lawyer] know all aspects of the case."⁶³ The client is "thereby encouraged . . . to communicate fully and frankly with the lawyer even as to . . . legally damaging subject matter."⁶⁴

Moreover, before eliciting incriminating information from the client, the lawyer is discouraged from warning the client that, if the client should testify falsely, the lawyer will reveal the client's

58. *Id.*

59. *Id.* at 854.

60. See *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964) (citing Note and Comments, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1048-51 (1964)) ("Our Constitution . . . strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.").

61. *Estelle v. Smith*, 451 U.S. 454, 471 (1981).

62. *Id.* at 462 (internal quotation marks omitted); see also *Mitchell v. United States*, 526 U.S. 314, 325 (1999) (stating that the defendant should not be enlisted as "an instrument in his or her own condemnation"); *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (quoting 2 HAWKINS, PLEAS OF THE CROWN ch. 46, § 34 (8th ed., 1824)) ("[T]he law will not suffer a prisoner to be made the deluded instrument of his own conviction."); *Bram v. United States*, 168 U.S. 532, 547 (1897).

63. ABA STANDARDS FOR CRIM. JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 4-3.2 (1993) [hereinafter ABA STANDARDS].

64. MODEL RULES R. 1.6 cmt.

confidences during the trial.⁶⁵ As the ABA has said, a defense lawyer should not “intimate to the client in any way” that the client should withhold information, “so as to afford defense counsel free rein to take action which would be precluded by counsel’s knowing of such facts.”⁶⁶

Model Rule 3.3 violates the Fifth and Sixth Amendments because it requires the lawyer, first, to elicit her client’s incriminating confidences without giving the client any warning or Fifth Amendment advice,⁶⁷ and second, on pain of professional discipline, to become an agent of the state by disclosing at trial the confidences that she has elicited.⁶⁸

The relevant cases begin with *Massiah v. United States*.⁶⁹ *Massiah* was indicted and released on bail.⁷⁰ His co-defendant and friend, Colson, agreed to cooperate with the government.⁷¹ Colson allowed an agent to install a transmitter in his car and, then, had a lengthy conversation with *Massiah* while the agent listened in.⁷² In the course of that conversation, *Massiah* made several incriminating statements that were used against him at trial.⁷³ The Supreme Court held that *Massiah*’s self-incriminating statements had to be suppressed because they had been “deliberately elicited by the police after the defendant had been indicted and, therefore, at a time when he was clearly entitled to a lawyer’s help.”⁷⁴ The Court went on to hold that the Constitution must protect a defendant’s right to counsel in that extrajudicial setting, because

65. ABA STANDARDS 4-3.2(b); MODEL RULES R. 1.4(a)(5) (requiring the lawyer to consult with the client about any relevant limitation on the lawyer’s conduct, but only after the lawyer “knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law”).

66. ABA STANDARDS 4-3.2(b). The purpose of the ABA Standards for Criminal Justice Prosecution and Defense Function (“Standard(s)”), is to elaborate on the ABA’s Model Rules of Professional Conduct by providing a “consensus view of all segments of the criminal justice community about what good, professional practice is and should be.” *Id.* at xiv. Thus, Standard 4-3.2 is an elaboration on Model Rule 1.1 (“Competence”) and Model Rule 1.6 (“Confidentiality of Information”).

67. MODEL RULES R. 3.3(a)(3); see Gillers, *Freedman’s Solution*, *supra* note 8, at 828 n.32, 832-33 (2006).

68. *Id.* For a fuller discussion of these matters, see UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 167-69.

69. 377 U.S. 204 (1964).

70. *Id.* at 202.

71. *Id.*

72. *Id.* at 203.

73. *Id.*

74. *Id.* at 204 (citing *Spano v. New York*, 360 U.S. 315, 327 (1959) (Stewart, J., concurring)). *Spano* involved a confession in a state court. 360 U.S. at 315. Chief Justice Warren’s opinion for the Court, requiring exclusion of the confession as involuntary, was based on the totality of the circumstances under the Due Process Clause of the Fourteenth Amendment. *Id.* at 323. Although *Massiah* was a federal prosecution, the holding applies, as well, to state prosecutions. 377 U.S. at 205-06; see *Brewer v. Williams*, 430 U.S. 387, 400 (1977).

otherwise the defendant might be denied “effective representation by counsel at the only stage when legal aid and advice would help him.”⁷⁵

Accordingly, Massiah’s Fifth and Sixth Amendment rights were jointly violated “when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.”⁷⁶

Moreover, the fact that the damaging testimony was not elicited from Massiah in a police station, but when he was free on bail, meant that Massiah was “more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.”⁷⁷ Thus, the Supreme Court has recognized that someone who is trusted by the defendant—epitomized by one’s own lawyer—creates a more serious constitutional problem than a known agent of one’s adversary.⁷⁸

This does not mean, of course, that a defendant has a “right to lie” with impunity. One very real consequence is that the defendant’s sentence can be enhanced if the judge concludes that he has lied under oath at trial.⁷⁹ A defendant who does this can also be prosecuted for perjury.⁸⁰ “However, one of the penalties for perjury is not a waiver of the defendant’s [constitutional] right to be warned by his lawyer of the consequences before he unwittingly makes incriminating statements to his lawyer.”⁸¹ Such a waiver of a constitutional right can be accomplished only by an intentional relinquishment of a known right,⁸² which is not possible when the defendant is unaware of the consequences at the time he incriminates himself.

Nor is denial of the right to counsel in presenting his testimony a penalty for a defendant’s perjury.⁸³ In *New Jersey v. Portash*,⁸⁴ defendant Portash had been granted use immunity for earlier grand jury

75. *Brewer*, 430 U.S. at 398; *Spano*, 360 U.S. at 326 (Douglas, J., concurring).

76. *Massiah*, 377 U.S. at 206.

77. *Id.* (quoting *United States v. Massiah*, 307 F.2d 62, 72-73 (Hays, J., dissenting)).

78. See UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 174-79 (discussing *West v. Adkins*, 487 U.S. 42, 52 (1988); *Estelle v. Smith*, 451 U.S. 454, 462 (1981); *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-19 (1981); and *United States v. Henry*, 447 U.S. 264, 270 (1980)).

79. *United States v. Grayson*, 438 U.S. 41, 54 (1978).

80. See *United States v. Apfelbaum*, 445 U.S. 115, 126-27 (1980).

81. UNDERSTANDING LAWYERS’ ETHICS, *supra* note 9, at 180.

82. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Id.*

83. *Nix v. Whiteside*, 475 U.S. 157, 170 n.6 (1986) (noting the repudiation of the narrative method).

84. 440 U.S. 450 (1979).

testimony.⁸⁵ When he was subsequently prosecuted based on other evidence, the trial court ruled in limine that if Portash testified to an alibi that contradicted his grand jury testimony, the prosecution would be able to use the grand jury testimony to impeach him.⁸⁶ Accordingly, Portash did not testify at his trial.⁸⁷

On appeal, it was assumed that Portash's immunized grand jury testimony had been truthful and that his trial testimony would have been perjurious.⁸⁸ Nevertheless, the Supreme Court held that Portash had a constitutional right to present his alibi without being impeached with his grand jury testimony.⁸⁹ Portash's conviction was therefore reversed by the Supreme Court in order to allow him to present the alibi on retrial.⁹⁰ Moreover, there was no suggestion that Portash's lawyer had acted improperly in attempting to present the perjurious alibi; on the contrary, the appeal could not even have been taken if the lawyer had not assisted Portash in that effort, and the case was sent back so that he could do so again at the retrial.⁹¹

B. Gillers's Current Constitutional Position

In his earlier *Hofstra Law Review* article, Gillers rejected my view that revealing client perjury violates a client's rights under the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.⁹² "[C]onstitutional jurisprudence does not support the argument Freedman makes," Gillers wrote. He further argued, "Requiring a defense lawyer to remedy client perjury, even through the use or revelation of confidential information, violates no constitutional rights of the accused"⁹³

However, in the more recent *Stanford Law Review* article, Gillers argues that "forcing a lawyer on pain of prosecution or discipline to produce incriminating evidence in her possession can . . . undermine"

85. *Id.* at 451-52.

86. *Id.* at 452.

87. *Id.*

88. *See id.* at 452-53.

89. *Id.* at 459-60.

90. *Id.* at 453, 459-60.

91. The decision in *Portash* was based on the Fifth Amendment alone. *Id.* at 461. The case is that much stronger when the incriminating evidence has been obtained in violation of the Sixth Amendment, as well—that is, when the incriminating evidence has been deliberately elicited from the defendant by his own lawyer, acting as an agent of the State, who has been forbidden to warn him in advance of the consequences.

92. Gillers, *Freedman's Solution*, *supra* note 8, at 831.

93. *Id.* at 833.

the client's Fifth and Sixth Amendment rights.⁹⁴ "What difference should it make whether the State's compulsion of the lawyer is through subpoena and threat of contempt," he asks, "or through the threat of prosecution and disbarment of a recalcitrant unsubsopnaed lawyer who fails to make delivery on her own motion?"⁹⁵ He answers that question: "If the lawyer's source was her client, the [client's] Fifth Amendment interest . . . may be equally compromised whichever the threat."⁹⁶

Gillers recognizes that if a lawyer's only motivation for taking possession of an object is to make it more difficult for the State to find it in a location where it has probative value or find it all, the lawyer's conduct is unethical and possibly illegal.⁹⁷ However, if a lawyer is permitted or encouraged to take possession of an item to prevent its destruction or alteration, to preserve stolen property, or to protect the public, the lawyer cannot then be required to give the item to the authorities if doing so would harm her client.⁹⁸ So far, so good.

Gillers goes on, however, to support an investigative procedure and a registry requirement to avoid a lawyer's retention of incriminating information.⁹⁹ In brief, the lawyer would be required to record her representation of a client in a new registry when her representation of the client is not known to the State.¹⁰⁰ The lawyer would also be required to provide the identity of the source of the item if it is not the client.¹⁰¹

There are serious problems with a registry requirement, which has not been adopted anywhere since Professor Kevin R. Reitz first proposed it more than two decades ago.¹⁰² If it were ever seriously considered, criminal defense lawyers, and probably the ABA, would—for good reasons—likely oppose the idea. If the proposal were enacted, clients would be discouraged from turning over possibly incriminating information to their lawyers, giving up the right to receive fully-informed legal advice. In addition, if a lawyer were to reveal to the State that she represented a client in a potential criminal matter she

94. Gillers, *Real Evidence*, *supra* note 9, at 853.

95. *Id.*

96. *Id.* at 853 nn.217-18 (citing *Hubbell v. United States*, 530 U.S. 27, 42, 45-46 (2000); *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Gillers adds that "a lawyer may take possession of, and retain an item indefinitely: (1) [i]n order to avoid danger to others; (2) [w]hen the item is the lawful property of another and immediate return is not possible without incriminating the client; (3) [i]f the item has exculpatory value; and (4) when return is impossible." Gillers, *Real Evidence*, *supra* note 9, at 857.

97. Gillers, *Real Evidence*, *supra* note 9, at 854.

98. *Id.* at 856-60.

99. The proposal was first made by Reitz, *supra* note 11, at 651.

100. Gillers, *Real Evidence*, *supra* note 9, at 862.

101. *Id.*

102. Reitz, *supra* note 11, at 587 n.64.

would incriminate the client in violation of the Fifth Amendment and/or other law.¹⁰³

V. CONCLUSION

My principal policy concern with requiring a lawyer to reveal a client's confidences to remedy perjury is that such a requirement would discourage clients from confiding in their lawyers and, thereby, obtaining informed legal advice. In his earlier *Hofstra Law Review* article, Professor Gillers dismissed this concern because he did not believe that requiring lawyers to reveal confidences would dissuade clients from being candid with them.¹⁰⁴ In his later *Stanford Law Review* article, however, Gillers embraces the importance of lawyers providing clients with fully informed legal advice.¹⁰⁵ For this reason, he says, a state should not be able to force a lawyer to produce a weapon or stolen item, even after the lawyer has examined it or has decided that she has no need to do so.¹⁰⁶ Gillers worries that, otherwise, full communication between lawyer and client would be impaired.

I welcome Professor Gillers's change of heart on the importance of lawyer-client confidentiality even at the cost of "candor." While he should go further and recognize that his acceptance of the registry solution to the problem of tangible evidence is an unsatisfactory half-loaf, it is both significant and commendable that Professor Gillers now accepts that lawyers should not be "undercover informants,"¹⁰⁷ turning on their own clients.

According to Professor Gillers's most recent thinking, Monroe Freedman's solution to the criminal defense lawyer's dilemma is *right* as a matter of policy and constitutional law.

103. See, e.g., *In re Grand Jury Proceeding*, Cherney, 898 F.2d 565, 568 (7th Cir. 1990). Attorney David Cherney was subpoenaed by the Grand Jury to reveal the name of the individual who paid legal fees for a known individual that Cherney was defending in a narcotics conspiracy trial. *Id.* Cherney refused to reveal the fee payer's identity, asserting that it constituted a confidential communication which was privileged because the payer was also allegedly involved in the drug operation and had consulted the attorney for legal advice in connection with that involvement. *Id.* The Seventh Circuit agreed: "In the situation at bar, the fee payer sought legal advice concerning his involvement in the drug conspiracy. Disclosure of the fee payer's identity would necessarily reveal the client's involvement in that crime and thus reveal his motive for seeking legal advice in the first place. . . . In effect, therefore, disclosure of the client's identity would expose the substance of a confidential communication between the attorney and the client." *Id.* at 568.

104. Gillers, *Freedman's Solution*, *supra* note 8, at 832-34.

105. Gillers, *Real Evidence*, *supra* note 9, at 829.

106. *Id.* at 855.

107. Adam Liptak, *supra* note 1, at WK4.